

Vickers



The Comptroller General  
of the United States

Washington, D.C. 20548

## Decision

Matter of: Satilla Rural Electric Membership Corporation

File: B-238187

Date: May 7, 1990

John P. Carey, Esq., Paul, Hastings, Janofsky & Walker, for the protester.  
Robert P. Edwards, Jr., Esq., Troutman, Sanders, Lockerman & Ashmore, for Georgia Power Co., an interested party.  
Barry D. Segal, Esq., Office of the General Counsel, General Services Administration, for the agency.  
James Vickers, Esq., and John Brosnan, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

### DIGEST

1. While timeliness of protest issue concerning evaluation of electric rates is unclear, it will be considered as a significant issue because it is one not previously decided and which may arise in future procurements for electric service.
2. Where offeror's proposal for electric service contains two rate schedules, one of which is unacceptable, but the unacceptable rate was not considered by agency in its cost evaluation and award selection and its inclusion in the resulting contract would have no impact on the services offered under the acceptable rate, the proposal may be accepted.
3. Cost evaluation of proposal for electric service for 10-year period did not result in a reasonably accurate prediction of the actual cost of the service where the agency's calculations were based on a January start date rather than the August start date listed in the solicitation and under the offered rate scheme, annualized results based on a January start date differ from those based on an August start date.

### DECISION

Satilla Rural Electric Membership Corporation protests the award of a contract to Georgia Power Company under request for proposals (RFP) No. GS-00P-AC87-91, issued by the

C-48487 / 141348

General Services Administration (GSA) for electric services for the Federal Correctional Institution at Jessup, Georgia.

The RFP, issued on March 27, 1989, requested proposals for firm, electric services for a 10-year period to begin "on or about August 1, 1989." The solicitation indicated that a yearly requirement of 10,930,000 kilowatt hours (KWH) with demands up to 2,862 kilowatts (KW) per month could be expected. Award was to be made based on the lowest cost for 10 years. Following the issuance of the RFP, offerors were advised by letters dated April 19 that "no curtailable or interruptible electric service or rates" would be considered. The best and final offers of Satilla and Georgia Power were evaluated with the following results:

	<u>Georgia Power</u>	<u>Satilla</u>
Average overall cost for 10,930,000 KWH (1 year)	\$ 588,710	\$ 624,725
Average cost per KWH	\$ .05386	\$ .05716
Total cost for 10 years	\$ 5,887,100	\$ 6,247,250

Award was made to Georgia Power on July 10, and Satilla was provided with written notice of award on that date. Satilla filed its protest with our Office on December 29.

Satilla argues that Georgia Power's proposal should not have been accepted because it violated the prohibition against the use of curtailable rate schedules. Satilla further contends that even if Georgia Power's proposal could be accepted, GSA improperly calculated the annual cost of Georgia Power's proposal and award should be made to Satilla as the low cost offeror.

We agree with Satilla on its second issue and sustain the protest on that basis.

GSA initially argues that Satilla's protest is untimely and should be dismissed. The agency states that it advised Satilla on July 6 that Georgia Power's proposal was based on that firm's PL-8 rate and that GSA's award decision was based on an evaluation of that rate. GSA points out that the essence of Satilla's protest is GSA's allegedly faulty cost evaluation and argues that based on the information provided on July 6, the protester could have calculated Georgia Power's cost and if Satilla determined that its cost was lower, it should have filed its protest within 10 working days, not 6 months later.

In response, Satilla states that its protest is directed against both the impropriety of the acceptance of Georgia Power's proposal despite its use of a curtailable rate and GSA's improper rate calculations which led to the erroneous conclusion that the Georgia Power proposal represented the lowest cost to the government. As far as the first issue is concerned, Satilla asserts that it was specifically informed by GSA that Georgia Power did not use a curtailable rate and states that it did not find out that such a rate was proposed until December 14 when at a meeting with GSA it was shown the cover sheet to Georgia Power's contract which indicates that the awardee's proposal was based on its SE-5 rate as well as its PL-8 rate. The protester maintains that the SE-5 rate is a curtailable one. Regarding the agency's rate evaluation, Satilla states that it could not understand how Georgia Power's proposal, based on the PL-8 rate, was lower in cost than Satilla's. Satilla states it asked to be debriefed and to see the cost calculations but these requests were refused. Finally, in October Satilla arranged the December 14 meeting between Satilla and GSA. Satilla protested to our Office within 10 working days thereafter.

Our Bid Protest Regulations require that protests be filed within 10 working days after the basis of protest is known or should have been known. 4 C.F.R. § 21.2(a)(2) (1989). Under that provision, it is clear that Satilla's protest of the acceptance of the SE-5 rate in Georgia Power's proposal is timely since the December 29 protest filing was within 10 working days of December 14, when Satilla learned of the SE-5 rate. It is not so clear, however, that the protest of the rate evaluation is timely. It appears that Satilla, not understanding how Georgia Power's cost under the PL-8 rate could be lower than Satilla's, had a basis for protest when it was advised of this evaluation result in July. On the other hand, Satilla's specific complaint about how the rate evaluation was conducted is based on information it was not provided until after the protest was filed. In any event, even if we view this protest issue as untimely, we think it is appropriate for consideration under 4 C.F.R. § 21.2(b), which provides that we may consider an untimely protest where it raises issues significant to the procurement system. What constitutes a significant issue is to be decided on a case by case basis. Technical Servs. Corp., B-190942, Apr. 13, 1978, 78-1 CPD ¶ 282. We generally regard a significant issue as one of widespread interest to the procurement community and that has not been previously decided. Emerson Elec. Co.--Reconsideration, B-220517.2, Nov. 26, 1985, 85-2 CPD ¶ 607. The issue here--the proper way to compare and evaluate the electric rates of competing concerns--is not one that we have decided and is one that

can be expected to arise in future procurements for electric service and is of considerable impact since utility contracts often are for 10-year periods. Accordingly, we consider the issue raised to be a significant one that should be treated on the merits.

Satilla's first argument is that GSA should have rejected Georgia Power's proposal because contrary to the prohibition against the use of curtailable rates<sup>1/</sup> that firm based its offer at least in part on its SE-5 rate, which Satilla argues is a curtailable rate.

The agency responds that Georgia Power's proposal complied with all solicitation requirements. It is GSA's view that Georgia Power's SE-5 rate is not curtailable because it does not contemplate any involuntary interruption or curtailment of service on the part of the power supplier. In any event, the agency states that it did not use the SE-5 rate in determining which firm offered the lowest rate for the 10-year period. That, according to the agency, was calculated based solely on Georgia Power's PL-8 rate.

The record shows that Georgia Power's proposal was based on a rate package consisting of both its PL-8 rate, which all parties agree is a firm noninterruptable, noncurtailable rate, and its SE-5 rate. The SE-5 rate, which is lower than the PL-8 rate, is charged when the government agrees to curtailable service. In light of the definition of curtailable rate, we think the SE-5 rate is such a rate. The fact that the SE-5 rate was included in Georgia Power's proposal, however, did not render the proposal unacceptable. Under the contract, the government is entitled to firm power billed at the PL-8 rate at all times. The possibility that the agency might agree to demand reduction and be billed at the lower SE-5 rate had no effect on the basic service that was offered and accepted. Moreover, Georgia Power's proposal was evaluated solely on the basis of the higher PL-8 rate. Thus, the fact that the SE-5 rate was included in Georgia Power's proposal simply had no impact on the

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<sup>1/</sup> According to the affidavit of an expert in electric utility rates submitted by the protester, a curtailable rate is one under which the customer will always receive full electric service even if it fails to reduce its demand upon the utility's request, but if it fails to do so the customer must pay a higher rate during the utility's peak demand periods.

competition and does not provide a basis for objecting to the award. See Custom Supply Co., B-232517, Oct. 31, 1988, 88-2 CPD ¶ 419.

Satilla's second argument is that GSA's cost evaluation was done improperly. The protester maintains that in concluding that the yearly cost for the required power under Georgia Power's PL-8 rate was \$588,710 GSA ignored the express "billing ratchet provisions" contained in the rate.<sup>2/</sup> The protester has calculated what it argues is Georgia Power's actual projected costs using the billing ratchet in the PL-8 rate, which it maintains is \$669,192 per year. Based on these calculations and GSA's evaluation of Satilla's cost at \$624,725 per year, Satilla concludes that it should have received the award as the firm offering the lowest actual cost.

The RFP included the following monthly load profile for 1 fiscal year:

<u>Month</u>	<u>Estimated Demand (KW)</u>	<u>Estimated Energy (KWH)</u>
October	2,348	960,000
November	2,019	840,000
December	1,913	810,000
January	1,463	630,000
February	1,463	610,000
March	1,634	680,000
April	1,768	710,000
May	1,947	810,000
June	2,201	980,000
July	2,862	1,400,000
August	2,862	1,400,000
September	2,470	1,100,000
	Total	10,930,000

It also indicated that the electrical services would begin "on or about" August 1, 1989. GSA states that because the two proposals were based on dissimilar rate schedules, it established an evaluation method which attempted to place

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<sup>2/</sup> PL-8 contains a billing provision which in essence provides that monthly charges will be based on "billing demand" rather than actual demand. Billing demand is, according to PL-8, calculated for the summer months using a complex formula which is based on the greatest of current actual demand, 95 percent of the highest actual demand for any prior summer month or 60 percent of the highest demand during a prior winter month.

the two offerors on a "level playing field." GSA states that it chose to evaluate both proposals on a calendar year basis.

The record shows that GSA's initial cost evaluation for Georgia Power did not consider the billing rachet in the PL-8 rate and was calculated as follows using the demand estimates in the RFP but rearranging them on the basis of a calendar year:

<u>MONTH</u>	<u>DEMAND (KW)</u>	<u>BILL DMD (KW)</u>	<u>POWER COST</u>
Jan.	1,463	1,463	\$ 35,474.13
Feb.	1,463	1,463	35,011.81
Mar.	1,634	1,634	38,598.48
Apr.	1,768	1,768	40,834.57
May	1,947	1,947	45,206.81
June	2,201	2,201	52,060.58
July	2,862	2,862	69,378.73
Aug.	2,862	2,862	69,378.73
Sept.	2,470	2,470	57,931.23
Oct.	2,348	2,348	53,290.53
Nov.	2,019	2,019	46,729.16
Dec.	1,913	1,913	44,815.41
		Total	\$588,710.17

It also appears that GSA made additional calculations at this time using the PL-8 billing rachet. These calculations were also based on a calender year. While the actual monthly calculations are not set forth in the evaluation record, the total of \$610,534.32, representing the initial contract year's cost, is set forth on the evaluation sheet.

Satilla argues that both the \$588,710.16 figure which GSA calculated without using the billing rachet and the \$610,534.22 figure are erroneous. The first figure is wrong, according to the protester, because the billing rachet included in PL-8 was ignored. While the second figure is based on the rachet, the protester points out the calculations which gave rise to it begin in the month of January instead of the month of August when, according to the solicitation, the service is to commence. Since under the PL-8 billing rachet the charges are often based on the actual demands incurred in prior months rather than the amount of power actually used in the billing month, the total charges for the initial year of service can vary significantly depending upon which month is assumed for the start of the services. In this respect, Satilla has submitted the following calculations representing the

initial year costs under PL-8 using the billing ratchet and August as the start.

<u>MONTH</u>	<u>DEMAND (KW)</u>	<u>BILL DMD (KW)</u>	<u>POWER COST</u>
Aug.	2,862	2,862	\$ 69,378.73
Sept.	2,470	2,719	60,797.72
Oct.	2,348	2,719	57,043.42
Nov.	2,019	2,719	53,782.30
Dec.	1,913	2,719	52,967.02
Jan.	1,463	2,719	48,075.34
Feb.	1,463	2,719	47,531.82
Mar.	1,634	2,719	49,434.14
Apr.	1,768	2,719	50,249.42
May	1,947	2,719	52,967.02
June	2,201	2,719	57,586.94
July	2,862	2,862	69,378.73
Total			\$669,192.62

Our review indicates these calculations are realistic and a valid representation of the cost of the services under the Georgia Power proposal.

The RFP informed offerors that the electric services were to begin in August and specified that the award was to be based on the lowest cost to the government for 10 years. In conducting an analysis of the probable cost of services, the agency must adhere to the guidelines set forth in the solicitation and perform the analysis in a manner so that it has a reasonable relationship to the actual costs of the service and which results in a reasonably accurate prediction as to which firm's proposal will in fact result in the lowest cost to the agency. See Pikes Peak Water Co., B-211984, Mar. 16, 1984, 84-1 CPD ¶ 315; Computer Sciences Corp., B-195582, Dec. 12, 1980, 80-2 CPD ¶ 424. Thus, while an agency generally may select any reasonable approach to evaluating proposals, Francis & Jackson, Assocs., 57 Comp. Gen. 244 (1978), 78-1 CPD ¶ 79, the approach may not be used if it would produce a distorted result or one inconsistent with the evaluation criteria. Id. We see no reason why this standard should not apply to long-term utility contracts just as it does to other contracts.

Here, GSA, in an attempt to place both offerors on a "level playing field," computed costs based on a January start date rather than a start date in August the anticipated contract commencement date. GSA has offered no reason other than the desire to evaluate both proposals on the same basis for

its use of the calendar year as a basis for its calculations.<sup>3/</sup> We do not understand why an August start date, the logical date to use since that was the actual start date of the contract, would not have accomplished the same purpose. Moreover, and more importantly, it seems clear from this record that in light of the PL-8 billing ratchet, an evaluation based on a January start date produces a result different from an evaluation with an August start date. Since actual contract performance was to start in August, we think the most realistic cost evaluation would be one based on an August start date. As indicated above, an August start date and use of the PL-8 billing ratchet indicates a Georgia Power cost of \$669,129.62 per year or \$6,691,296.20 for the 10-year contract period. The protester's evaluated cost was lower than that. Thus, the evaluation approach used by GSA in fact did not establish a common basis for evaluation of the two proposals but instead produced a result inconsistent with the RFP criteria calling for award based on the proposal representing the least cost to the government over the life of the contract. We therefore sustain the protest.

In fashioning the appropriate corrective action, we note that GSA states that its calculation of Satilla's costs was flawed because it was based on a peak demand of 2,061 kw rather than the 2,862 kw peak listed in the RFP. We cannot determine from the record what effect a proper calculation in this respect would have on the relative standing of offerors. Accordingly, we are recommending that GSA reevaluate both proposals in light of the concerns expressed in this decision. If, following these calculations, it is determined that Satilla's proposal represents the lowest cost to the government, Georgia Power's contract should be terminated and award be made to Satilla for the remaining contract period. If Georgia Power remains low, no corrective action is necessary. In any event, since the protest is sustained, Satilla is entitled to the costs of pursuing the protest, including reasonable attorneys' fees. Bid Protest Regulations, 4 C.F.R. § 21.6(a)(e) (1989).



**Acting** Comptroller General  
of the United States

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<sup>3/</sup> According to GSA, Satilla in its proposal used a calendar year basis for its proposed rate. The agency does not argue that it could not have evaluated Satilla's rate using an August startup date.